STATE OF MICHIGAN
COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff-Appellant,

v

Court of Appeals # _____
Court of Claims # 20-000125-MM
Hon. Christopher M. Murray

BOARD OF STATE CANVASSERS,

Defendant-Appellee.
_____/

The appeal involves a ruling that a provision of the constitution, a statute, rule or regulation, or other state governmental action is invalid

Matthew Erard (P81091)
LAW OFFICE OF
MATTHEW S. ERARD, PLLC
Counsel for Plaintiff-Appellant
400 Bagley Street #939
Detroit, MI 48226
248-765-1605
mserard@gmail.com

Heather S. Meingast (P55439)
Assistant Attorney General
Counsel for Defendant-Appellee
Box 30217
Lansing, MI 48909
517-335-7659
meingasth@michigan.gov

Ellis Boal (P10913)
Counsel for Plaintiff-Appellant
9330 Woods Road
Charlevoix, MI 49720
231-547-2626
ellisboal@voyager.net

Eric A. Grill (P64713)
Assistant Attorney General
Counsel for Defendant-Appellee
Box 30217
Lansing, MI 48909
517-335-7659
grille@michigan.gov

_____/

Oral argument not requested

BRIEF OF APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Public Acts

Rules

Other Authorities

STATEMENT OF JURISDICTION

The Court of Claims has exclusive jurisdiction over declaratory and equitable constitutional claims against the state.[1] The Committee to Ban Fracking in Michigan ("the Committee") sued the Board of State Canvassers ("the Canvassers") in that Court for declaratory and injunctive relief on July 6, 2020.

On July 20, 2020, the Court of Claims entered an opinion and order denying the Committee's motion and dismissing the case *sua sponte* under MCR 2.116(C)(4) and 2.116(I)(1) on the ground MCL 168.479(2) divests the court of jurisdiction to grant relief.

This appeal timely followed on July 22, 2020. This Court has jurisdiction under MCR 7.203(A)(1).

1 MCL 600.6419(1)(a).

STATEMENT OF QUESTIONS PRESENTED

A. Did the Court of Claims have jurisdiction? The Committee says "yes." The Court of Claims says "no." The Canvassers say "no."

B. Is MCL 168.472a unconstitutional as applied to initiatives under Const 1963, art 2, § 9? The Court of Claims did not answer. The Committee says "yes." The Canvassers say "no."

C. If the Court of Claims had jurisdiction and if 472a is unconstitutional, may this Court provide relief in time for the 2020 election? The Court of Claims did not answer. The parties agree that timely relief may be provided if certain rules and deadlines are modified, but they disagree as to which rules or deadlines.

INTRODUCTION

Following Defendant Board of State Canvassers' declaration of insufficiency to the Committee's statutory initiative petition, the Committee filed an original action in the Supreme Court seeking mandamus relief on the ground that MCL 168.472a's prohibition on counting statutory initiative petition signatures dated more than 180 days before the date of filing unconstitutionally infringes the self-executing initiative provision of Const 1963, art 2, § 9.

Following the Supreme Court's denial of mandamus relief without opinion, the Committee promptly filed an action for declaratory and injunctive relief in the Court of Claims and concurrently moved for a preliminary injunction requiring the Board of State Canvassers to canvass the Committee's petition without exclusion of signatures older than 180 days under 472a. The Court of Claims denied relief and dismissed the case on the sole ground of construing that MCL 168.479(2) deprives the court of subject matter jurisdiction over the Committee's claim. Consequently, the Committee now brings this appeal seeking reversal of the Court of Claims' dismissal and denial of its motion for preliminary injunctive relief.

PRIOR PROCEEDINGS

A. Proceedings before the Board of State Canvassers

This Court is well familiar with the underlying facts and prior holdings in

this matter. See *Committee to Ban Fracking in Michigan v Director of Elections*[2] and *Committee to Ban Fracking in Michigan v Secretary of State*.[3]

In sum, the Committee began collecting signatures for a statutory initiative in 2015. After this Court in 2017 rejected the Committee's unripe challenge to MCL 168.472a – a statutory restriction of collecting signatures to a period of 180 days before filing them – the Committee filed the signatures in November 2018. At the point of filing in 2018 the Committee expected to ripen and hoped to win the constitutional challenge.

But supported by the Canvassers, the Bureau of Elections ("BOE") rejected the filing because of a supposedly fatal error on the fronts of the Committee's signature sheets. After 17 months and interminable briefing, 4½ months ago this Court rejected their "unlawful" action and reasoning (the adjective was the Court's) and ordered the signatures in the door, with the filing backdated to November 2018:

> Constitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to *facilitate rather than hamper* the exercise by the people of these reserved rights. [footnote omitted] … On remand, the Secretary shall accept the petition for filing and forward it to the Board for canvassing as required by the statute. … [T]he petition must be treated as having been filed on [November 5, 2018]. To hold otherwise would *punish petition sponsors and the electorate* for

---

2 Unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), 2017 Mich. App. LEXIS 405.

3 Unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 350161), 2020 Mich. App. LEXIS 2563.

unlawful actions taken by election officials.[4]

For three weeks the Canvassers and BOE continued to refuse the signatures while they decided whether to seek review of this Court's decision. Finally they received the signatures on May 1, 2020. The delivery was accompanied by a plea for processing speed in light of MCL 168.477(1), which required the Canvassers to act by 100 days before the election on November 3, 2020.[5] That is, the Canvassers have to act by July 26, 2020 (a Sunday).

Had the Canvassers acted promptly the schedule would have been tight, but they could have acted in time for Court review of 472a, which, if successful, would have enabled the Canvassers' usual canvassing methods.

But despite the Committee's entreaties, the Canvassers took their time – 39 days – to canvass and reach a decision, almost certainly foreclosing action by July 26. By comparison:

- Similar review for MiLegalize, another initiative committee in 2016, took just 9 days between filing date and Canvasser action.[6]

---

4 Emphasis added.

5 Exhibit B to the Canvassers' response below, attaching 5-1-20 cover letter of Committee Director LuAnne Kozma, which requested expedited handling on pages 4-5, and attached this Court's opinion, which on page 4 cited the 100-day rule of 477.

6 Mich Dep't of State, *Staff Report of "Michigan Comprehensive Cannabis Reform" Initiative Petition* (June 7, 2016), available at ,*https://www.michigan.gov/documents/sos/Staff_Report_-_Cannabis_Law_Reform_526211_7.pdf* > (accessed today).

- On May 29, BOE took time to canvass signatures for 20 candidates[7] for the primary election on August 4. These signatures had less priority than the Committee's, having been filed after the Committee's. The total signatures among the 20 summed to about 30,000.

- BOE took time on May 15 to draw and distribute a signature sample for another committee, Michigan Values Life, which had filed its signatures over a year after this Committee did.[8]

Finally BOE counted all the Committee signatures and reported they summed to 271,021. This was 7% more than the minimum requirement of 252,523, established by Const 1963, art 2 § 9.

However, in light of 472a, BOE recommended that the Canvassers declare the petition insufficient because the Committee had collected about 89% of the signatures outside the 180-day window.

The Canvassers so declared on June 8, 2020.

B. Proceedings at the Supreme Court under MCL 168.479

MCL 168.479 says:

> (1) Notwithstanding any other law to the contrary and subject to subsection (2), any person who feels aggrieved by any determination made by the board of state canvassers *may* have the determination reviewed by *mandamus or other appropriate remedy* in the supreme court.

---

7 *Id*., *Meeting of the Board of State Canvassers, May 29, 2020*, available at <https://michigan.gov/documents/sos/052920_Approved_Mtg_Minutes2_695764_7.pdf> (accessed today).

8 *Id*., *Challenge Deadline for Initiative Petition Sponsored by Michigan Values Life* (May 15, 2020) <*https://www.michigan.gov/documents/sos/Announcement_-_MVL_Challenge_Deadline_690763_7.pdf* > (accessed today).

> (2) If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person must file a *legal challenge* to the board's determination in the supreme court within 7 business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. Any *legal challenge* to the official declaration of the sufficiency or insufficiency of an initiative petition has the highest priority and shall be advanced on the supreme court docket so as to provide for the earliest possible disposition.[9]

Subsection (1) does not say what "other appropriate remedy" besides mandamus might be available in the Supreme Court.

The reference in subsection (2) to "legal challenge" would seem to include mandamus challenges, but what other type of challenge that it might refer to, if any, is not specified. As discussed below, in an original proceeding, the Supreme Court lacks jurisdiction to award equitable or declaratory relief.

Two days later, the Committee sought review in the Supreme Court under 479, the "initial" line of review as the Attorney General explained last year in OAG 7310:

> As a general matter, the Supreme Court retains complete discretion to consider which cases it will hear. . . . In enacting § 479(2), the Legislature neither granted the Supreme Court jurisdiction nor withheld jurisdiction. ... Subsection 479(2) simply requires that an aggrieved person file a legal challenge to the sufficiency of an initiative petition in the Supreme Court. Nothing in § 479(2) requires the Supreme Court to exercise its jurisdiction; instead, it merely directs persons where to file legal challenges. ... Even though the Legislature may direct litigants to make their **initial** filings in the Supreme Court, there is, of course, no guarantee that the Supreme Court will

9 Emphasis added.

actually take jurisdiction of that legal challenge.[10]

Echoing subsection (1) of 479, the Committee's complaint (and the reply) sought a writ of mandamus "or other appropriate remedy" without elaboration as to what some other appropriate remedy might possibly be. Particularly, the complaint did not proceed under the "legal challenge" verbiage of subsection (2).

The Canvassers moved to dismiss.

On July 2, the Court rejected both parties' positions without opinion, stating that it had considered only a mandamus petition:

> The complaint for *mandamus* is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief. The motion to dismiss is DENIED as moot.[11]

On the next business day after the Supreme Court ruled, the Committee filed the present case for declaratory and equitable relief in the Court of Claims.

Since 2016, the Committee has been seeking a ruling whether 472a is unconstitutional. Since 2018, it has also asked that its filing be held sufficient. On multiple occasions the courts have declined to rule. The Committee acknowledges the Supreme Court's discretion to refuse cases. But if the Court of Claims is thereby barred, the "hampering" effect of 472a – to use this Court's term – is forever shielded from facing a constitutional challenge by any litigant in any court. This case is the last and only chance for everyone.

---

10 OAG 2019-2020, No. 7310, Question 5(A) (emphasis added).

11 Emphasis added.

SUMMARY OF ARGUMENT

A. Summary

Under MCL 600.6419(1)(a) and (7), the Court of Claims has exclusive jurisdiction over declaratory, equitable, and constitutional claims against state boards. For its part, under our Constitution, the Supreme Court has original jurisdiction only over prerogative and remedial writs, such as mandamus. MCL 168.479 did not and could not extend the Supreme Court's jurisdiction to declaratory or equitable claims. At most, 479 requires only that a person aggrieved by a Canvassers decision file an initial challenge in the Supreme Court, which the Committee did. In its discretion, that Court chose not to exercise jurisdiction, which left the Committee free to come to the Court of Claims. The Supreme Court may always decline jurisdiction. If it continues to do so in challenges to MCL 168.472a, and MCL 168.479(2) bars any other avenue for relief, the result will be that no future committee can ever test that statute's validity even while laboring under its burdens.

MCL 168.472a is unconstitutional as applied to statutory initiative petitions under Const 1963, art 2, § 9 because it directly infringes on a self-executing constitutional provision permitting no legislative intrusion. It has nothing to do with assuring signature validity, but rather serves only to curtail the utilization of

the initiative process. *Consumers Power Company v Attorney General*[12] was never applicable to statutory initiatives and was, in any event, superseded by the 2016 amendment to 472a, which made the statute even more contravening of the Constitution than it was before.

Time is of the essence because deadlines for consideration by the Legislature and electorate in 2020 are fast approaching.

B. The Need for Speedy Action

The threshold jurisdictional issue on which the Court of Claims based its disposition of the case is discussed below.

But, at this present date, amid the 100-day requirement of MCL 168.477(1) and 40-day period for legislative review of an invoked initiative, there is also a likely need for relief to fashioned to mitigate conflict with rapidly impending deadlines.

The *entire* reason there is a time-crunch is because of the Canvassers' unlawful action of tolerating the BOE's refusal to take Committee signatures in November 2018, resulting in a 17-month delay. During this period canvassing could have taken place in the Canvassers' customary rigorous fashion of recent years.

Add to that five weeks after May 1, 2020 which the BOE and Canvassers

12 426 Mich 1 (1986).

spent in concluding what the Committee admitted and was obvious from the beginning, that it did not have enough signatures when excluding those barred by 472a. The Canvassers could have finished the job in nine days as in 2016. Instead they took time to attend to other signatures filed by a group of candidates, and signatures of another committee which filed more than a year *after* this Committee. In effective defiance of the order of this Court, they did not treat Committee signatures as though filed on in November 2018.

So what can a Court do now? One answer: take a tip from *Ferency v Secretary of State*, 409 Mich 569 (1980). In part V of the opinion, the Court faced a mootness defense of the Canvassers, saying it was impossible to canvass a constitutional amendment petition because of the 60-day deadline set forth by Const 1963, art 12 § 2, a deadline which had already passed.

The deadline had passed not because of the Canvassers' delay, but because they complied with an improper lower Court ruling. Like the Committee here, that committee (the Tisch Coalition) "did everything the constitution requires of it." 409 Mich at 600.

The *Ferency* Court responded: "It would be manifestly unfair to hold that because the deadline has passed this Court can afford no relief." *Id*. at 601. Expiration of the 60-day deadline did not preclude the certification of the proposed amendment. The Court reversed the lower court and directed the Canvassers to

attend to the canvassing duties of 477,

> and such other statutory duties as may follow thereon, observing, in each instance, *to the maximum extent practicable*, the time limits prescribed for the performance of such various duties. [406 Mich at 602 (emphasis added)].

This Court can bend the 100-day deadline as *Ferency* did, and allow the Canvassers to canvass.

But there is a second answer as to what this Court can do. Const 1963, art 9 § 2 does not actually require that canvassing be rigorous. There is no definition of "canvassing" in the Constitution or statutes, and never has been, going back to 1908.

James K Pollock was a constitutional scholar whose history *The Initiative and Referendum in Michigan* was cited twice, and whose own remarks as a delegate to the 1961 Convention were cited once, by Judge Lesinski of this Court in *Wolverine Golf Club v Secretary of State*.[13] Judge Lesinski's history of Const 1963, art 2 § 9 was itself cited admiringly by the Supreme Court[14] in affirming the Court of Appeals.

Writing before the days of the statewide Qualified Voter File[15] which did not

---

13 24 Mich App 711 (1970), aff'd *Wolverine Golf Club v Secretary of State*, 384 Mich 461 (1971).

14 384 Mich at 465-66.

15 See the legislative histories of MCL 168.509m, 509n, 509o, 509p, 509q, 509r.

exist and which the Canvassers did not utilize for signature validation until 1995,[16]

Pollock's piece had this to say about the possibility of signature fraud:

> The mechanical procedure which is followed by the secretary of state and the various county clerks in receiving and filing petitions is routine. The petition is stamped 'filed' or 'received' and in due course is sent to the secretary of state. If frauds have been perpetrated in connection with the petitions, nothing is done unless some interested individuals or groups call the matter to the attention of the prosecutor, or bring some legal action. Most petitions are not checked, and the validity of signatures cannot effectively be called in question unless they are compared to the registration lists, and this is not required by the constitution. Consequently, a *mere tabulation* of the returns is all that is ordinarily done, and the filing officers have no authority to go behind the face of the petition. In such matters, which are *entirely different from election contests*, it is probably not necessary to have elaborate judicial action, for *speed is necessary, and a final popular remedy for any fraud lies in the ballot box*.[17]

If mere tabulation without checking signature validation was good enough for canvassing under the 1908 constitution and for the first 20 years after the 1963 Constitution, and there has been no change in the law of "canvassing" since then, then "mere tabulation" of the signatures is good enough today.

And in fact as BOE has stated, the Canvassers have already tabulated the Committee's signatures. There are more than enough to certify.

More rigorous canvassing might have produced a different result, but the Canvassers unlawfully and negligently let the time slip by. They have foregone

---

16 See MCL 168.476(1).

17 Pollock, *The Initiative and Referendum in Michigan* (Ann Arbor: University of Michigan Press, 1940), p 9 (emphasis added), available: <https://babel.hathitrust.org/cgi/pt?id=mdp.39015003763557> (accessed today) (emphasis added).

rigor. The Legislature and the voters are entitled to a fair shot at the option of enacting the petition. To again use this Court's term, the electorate and the Committee have been "punished" enough.

STATEMENT OF FACTS

As amended in 2016, 472a says:

> The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

In 1971, the Supreme Court decided *Wolverine Golf Club v Secretary of State*, 384 Mich 461 (1971), striking down MCL 168.472's prohibition on filing statutory initiative petitions fewer than ten days prior to the start of a legislative session upon the ground that "the legislature may not act to impose additional obligations on a self-executing constitutional provision." *Id*. at 466.

In 1973, the Legislature enacted 168.472a, which then provided:

> It shall be rebuttably presumed that the signature on a petition which proposes an amendment to the constitution or is to initiate legislation, is stale and void if it was made more than 180 days before the petition was filed with the office of the secretary of state.

472a was enacted originally in 1973. According to contemporaneous media accounts, the political background was a constitutional initiative of the Legislative Salary Amendment Committee, which proposed to cut lawmakers' salaries.[18]

---

18 Appendix Exhibit C (Compl. Ex. A): Kenyon, *Housewife Seeks Cut in*

Apart from two stylistic wording changes made by a 1999 legislative amendment,[19] this same original version of 472a, permitting rebuttal of the presumed staleness of signatures older than 180 days, was in force when the Committee began collecting signatures on its initiative petition in May of 2015.

In OAG 1974, No. 4813, the Attorney General opined that the 180-day signature limitation of MCL 168.472a, as then worded in its less-stringent original formulation, was unconstitutional as to both statutory initiative and constitutional amendatory initiative petitions, upon respectively differing grounds. As to Const 1963, art 2 § 9, governing statutory initiative petitions, the Attorney General opined:

> This provision has been held to be self-executing [citing *Wolverine Golf Club*]. Although that provision concludes with language to the effect that the legislature should implement the provisions thereof, such language has been given a very limited construction by the Michigan Supreme Court, which held that this provision is merely:
>
> "... a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate...."
>
> I am consequently of the opinion that, as applied to signatures affixed to petitions which initiate legislation pursuant to Const 1963, art 2 § 9, § 472a is beyond the legislature's power to implement [and] said section and is therefore unconstitutional and unenforceable.[20]

Legislators' Pay, Battle Creek Enquirer (March 24, 1972), p 6; News-Palladium, *New Bill Eases Petition Rules*, News-Palladium (July 26 1973), p 10; Times Herald, *Kelley Rules Petition Drive Time Limits Unconstitutional*, Times Herald (August 14, 1974), p 10.

19 1999 PA 219 substituted "that" for "which" and "the signature" for "it."

20 Appendix Exhibit D (Compl. Ex. B): OAG 1974, No. 4813 at

In the ensuing twelve years, initiative petitions, including some with signatures gathered more than 180 days before filing, were filed with the Secretary of State, certified by the Board of State Canvassers, and approved by vote of the people.

In *Consumers Power Company v Attorney General*, 426 Mich 1 (1986), the Supreme Court affirmed a judgment of the circuit court which overruled OAG 4813, but only as applied to constitutional amendatory initiatives under Const 1963, art 12, § 2. There, the Court grounded its holding entirely upon a distinct single-sentence provision of art 12, § 2 providing that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." *Id*. at 5-9.

In contrast to art 12 § 2, the language of art 2 § 9 contains no similar call for legislative action respecting the manner of circulating and signing statutory initiative petitions. Hence, the Court's *Consumers Power* decision did not disturb the finding of OAG 4813 as applied to statutory initiatives.

On August 8, 1986, while *Consumers Power* was on appeal from the circuit court, the Canvassers adopted a policy of attempting to implement the 180-day statute and applied it to *both* constitutional *and* statutory initiatives. The policy stood without challenge until December 14, 2015, when then serving State

---

172 (quoting 384 Mich at 466).

Elections Director and Secretary of the Board of State Canvassers, Christopher Thomas, proposed an amendment to the 1986 implementation policy. By letters of January 8 and 21, 2016, the Committee's legal counsel reminded the Canvassers that *Consumers Power* did not apply to statutory initiatives, and that *Wolverine Golf Club* continued to bind them as to statutory initiatives.

The Committee's legal counsel testified to the Canvassers to the same effect on March 24, 2016. On this occasion, in response to a specific query about *Wolverine Golf Club* and *Consumers Power*, the Canvassers' secretary admitted that the BOE had been treating petitions under Const 1963, art 2 § 9 the same as petitions under art 12, § 2:

> MR. BOAL: So whatever else you decide, the Attorney General's opinion [OAG 4813] continues to bind you as to statutory initiatives. It was only overturned as to constitutional initiatives [by *Consumers Power*]. I've said this before. I've asked for anybody who disagrees with me to say that they disagree with me, including Chris Thomas, including John Griffin, who is back here representing the oil and gas industry, and no one has come forward with any counter argument to that. So I consider that this stands, you know, unrebutted.
> . . .
> MR. THOMAS: I guess I would only say I don't have a case to cite about a legislative initiative. I would say we have applied it to a legislative initiative as we've canvassed petitions ever since the 1986 case. So I guess there is a feeling that if it's good for one, it's good for the other. I don't see anything that specifically would say that if 180 days is good for getting ten percent of the vote, why wouldn't it be good for getting eight percent of the vote? So we have operated under it just so. I take your point. I don't have a case and I don't have anything else. But just so the record's clear, we have operated that way.[21]

21 Appendix Exhibit E (Compl. Exhibit C).

On June 9, 2016, the Legislature enacted 2016 PA 142, which amended MCL 168.472a by replacing the preceding rebuttable presumption of staleness to signatures over 180 days old with the irrebuttable preclusion of such signatures from being counted. The current iteration is quoted above.

In the Governor's press release announcing his signing of the amendatory bill enacted as 2016 PA 142, he asserted no objective related to the voter registration status of petition signers or the validity of their signatures, but rather attributed to it the sole purpose of "help[ing] ensure the issues that make the ballot are the ones that matter most to Michiganders."[22]

Under 1994 PA 441, enacted eight years after *Consumers Power*, the legislature established the Qualified Voter File. Use of this technology is now statutorily mandated for the process of determining the validity of initiative petition signatures[23] and provides for the immediate verifiability of voters' registration status and residence information both presently and on a petition signature's date of signing.[24]

---

22 Office of Governor Rick Snyder, *Gov. Rick Snyder Signs Bill Establishing 180-day Deadline for Petition Signatures on Proposed Legislation and Constitutional Amendments* (published June 7, 2016) <*http://michigan.gov/snyder/0,4668,7-277-57577_57657-386394--,00.html*> (accessed today).

23 MCL 168.476(1).

24 *Id.*; MCL 168.509o; 509q.

STANDARD OF REVIEW

This Court reviews a trial court's denial of injunctive relief for abuse of discretion, but reviews questions of law de novo. *Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit*, 482 Mich 18, 28 (2008). In deciding whether to grant an injunction, the Court must consider four factors: (1) the movant's likelihood of succeeding on the merits, (2) the danger that the movant will suffer irreparable harm if the injunction is not issued; (3) the risk that the movant would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. *Barrow v City of Detroit Election Comm'n*, 305 Mich App 649, 662 (2014).

ARGUMENT

I. THE COMMITTEE IS LIKELY TO SUCCEED ON THE MERITS.

A. MCL 168.479(2) Did Not Divest the Court of Claims of Jurisdiction Over the Committee's Action for Declaratory and Injunctive Relief.

Although the Canvassers conceded that governing case law does not permit the application of res judicata to an order denying a writ of mandamus without opinion,[25] the Court of Claims held itself without jurisdiction, based on its reading of MCL 168.479. It reasoned that the Supreme Court's jurisdiction over review of Canvassers decisions is in effect exclusive and therefore the Court of Claims itself had no jurisdiction.

25 See *Hoffman v Silverthorn*, 137 Mich 60, 64 (1904)

In spite of this conclusion, nothing in the language of 479 can be read to vest the Supreme Court *exclusive* subject matter jurisdiction over any claim implicating a Board of State Canvassers decision. To the contrary, the statute simply provides that "subject to" the specifications of subsection (2), any person who feels aggrieved by a Board of State Canvassers determination "*may* have the determination reviewed by mandamus or other appropriate remedy in the supreme court." MCL 168.479 (emphasis added). The seven-day filing requirement is thus mandatory only as a condition precedent for pursuing that discretionary avenue for potential relief.

Although the Court of Claims reads the wording, "notwithstanding any other law to the contrary" as a restrictive clause, that language precedes the *permissively* formulated wording of 479(1). The basis for that specification is that, unlike 479, other statutes such as MCL 600.6419(1)(a) and 600.4401, *do* limit original jurisdiction over mandamus actions against state officers and contrastingly vest such original jurisdiction in other courts.

Moreover, even if 479(2) could be read to mandate that the Supreme Court must be the venue in which a person aggrieved by a Board of State Canvassers decision seeks initial relief, it certainly contains no language proscribing other remedies in the event that the Supreme Court declines to issue mandamus relief without preclusion. Here, the Committee has satisfied such a prerequisite. See

Detroit Auto Inter-Ins Exch v Sanford, 141 Mich App 820, 826 (1985) ("[T]he right of a party to obtain declaratory relief . . . is not barred by the existence of another remedy").

In explaining, the Court held that 479 is not limited to filing a writ of mandamus with the Supreme Court, the Court of claims says:

> Instead, it states that a person aggrieved by a Board decision on the sufficiency of initiative petitions must file "a legal challenge" with the Supreme Court, thus allowing this expedited filing with the state's highest court to include *any* legal challenge to the Board decision to reject the petitions.[26]

Such "legal challenges" would include, the Court implied, a claim for declaratory judgment like the present one. But the sole source of Supreme Court jurisdiction is Const 1963, art 6 § 4, which the legislature cannot extend by statute. *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 68-69 (1940). Neither 479 nor any other statute can extend that Court's original jurisdiction to include declaratory judgments.[27]

As for the Court of Claims, its jurisdiction over declaratory and equitable constitutional claims against state boards and officers is exclusive. MCL

---

26 Court of Claims decision, p 5; emphasis in original.

27 See Const 1963, art 6 § 4 (declaratory judgment is neither a "prerogative" or "remedial" writ within the Supreme Court's jurisdiction.); *Stephenson v Golden*, 279 Mich 710, 732 (1937) ("This court has no original equity jurisdiction"); cf *Musselman v Governor*, 200 Mich App 656, 667 (1993) ("We have no original jurisdiction to issue a declaratory judgment.")

600.6419(1)(a). 479's references to "other appropriate remedy" and "legal challenges" – being so vague – cannot change that.

Accordingly the Court of Claims erred in holding:

> That a writ of mandamus was filed [in the Supreme Court], and that a declaratory judgment is sought here, is of no moment. Any legal challenge to the Board's decision was to be filed in the Supreme Court, not here.

In support, the Court immediately added:

> By making the Supreme Court the court of original jurisdiction, and ensuring that any such case be of "the highest priority" on that Court's docket, the Legislature tried to ensure a prompt and final resolution to any legal challenge brought against the Board with respect to initiative petitions. To conclude otherwise would require this Court to ignore the clear commands of MCL 168.479(2).

But as the Attorney General pointed out in answer to Question 5(B) in the above-cited Opinion,[28] the "highest priority" verbiage of 479 cited by the Court is unconstitutional under Const 1963, art 3 § 2 as a violation of the separation of powers.

Under the Court of Claims' construction, MCL 168.479 would operate to bar any constitutional violation implicating a Board of State Canvassers decision from being redressed through any means other than mandamus and only then in the event that such a challenge happens to be among the very few selected for review

---

28 OAG 2019-2020, No. 7310, Exhibit G to the Canvassers' response below, and also found at *https://www.ag.state.mi.us/opinion/datafiles/2010s/op10389.htm* (May 22, 2019), answer to Question No. 5(B), pp 49-51.

by the Supreme Court. And given the courts' prior ruling that no challenge to the validity of MCL 168.472a could be ripe until the time of its direct enforcement against the plaintiff,[29] that statute would be insulated from ever facing a declaratory judgment challenge by any litigant in any court.

Here, the Committee went initially to the Supreme Court as 479 and the Attorney General say it had to. But construing the complaint solely as one for mandamus, that Court denied the writ. That does not mean it is not a fit case for declaratory or equitable relief.

B. MCL 168.472a is Unconstitutional as Applied to Statutory Initiatives under Const 1963, art 2, § 9.

As a constitutional power reserved to the people of Michigan, the statutory initiative procedure under Const 1963, art 2, § 9 is not merely an election process, but rather "an express limitation on the authority of the legislature." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214 (1985). Because MCL 168.472a imposes a direct curtailment of a self-executing constitutional provision permitting no legislative intrusion, its extension to statutory initiative petitions cannot be constitutionally sustained.

1. The Statutory Initiative Provision of Const 1963, art 2, § 9 is Self-Executing and Prohibitive of Legislative Meddling.

29 *Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), 2017 Mich. App. LEXIS 405.

The statutory initiative procedure of Const 1963, art 2, § 9 is a self-executing constitutional provision which grants the legislature no authority to impose additional obligations on its criteria for an initiative's invocation. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971).

In *Wolverine Golf Club*, the Supreme affirmed a decision of the Court of Appeals which had ordered the Canvassers "forthwith" to accept initiatory petitions "for canvass" and immediate submission to the Legislature, though the petitions violated the 10-day timing provision of MCL 168.472. The reason: MCL 168.472 was not a "constitutionally permissible implementation" of art 2, § 9:

> We do not regard this statute as an implementation of the provision of Const 1963 art 2, § 9. We read the stricture of that section, "the legislature shall implement the provisions of this section," as a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or electorate. This constitutional procedure is self-executing. . . . It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. [384 Mich at 466].

In enacting valid legislation supplemental to a self-executing constitutional provision, such legislation must have the "object to further the exercise of constitutional right and make it more available, and such law must not curtail the rights reserved, or exceed the limitations specified." *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 730 (1970), aff'd 384 Mich 461 (1971). Conversely, by mandating that valid and verifiable signatures of registered electors "shall not be counted," 472a not only subjects the process to additional obligations,

but directly contravenes the process and benchmark criteria set forth by the constitution itself.

In spite of *Wolverine Golf Club* and the issuance of an Attorney General Opinion finding 472a's less-stringent former iteration to be invalid as to statutory initiative petitions on the basis of that precedent,[30] The Canvassers have relied fully on *Consumers Power Company v Attorney General*, 426 Mich 1 (1986), to justify enforcing the statute against constitutional amendatory and statutory initiative petitions alike. Yet not only was the *Consumers Power* Court's review exclusively limited to the constitutionality of 472a's former version as applied to constitutional amendatory initiatives under Const 1963, art 12, § 2, but its ratio decidendi very strongly further underscores the invalidity of the statute's application to initiatives under art 2, § 9.

Despite the statute having then imposed only a rebuttable presumption of staleness to signatures collected over 180 days before filing, the *Consumers Power* Court fully grounded its holding upon the distinct provision of art 12, § 2 providing that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." 426 Mich at 5. Noting the "extreme importance" of the fact that the sentence just quoted "summons legislative aid . . . in the areas of circulating and singing," the Court held that this distinct sentence of

30 OAG 1974, No. 4813

art 12, § 2 is what "provides the authorization for the Legislature to have enacted MCL 168.472a" as a measure to "prescribe by law the manner of signing and circulating petitions to propose constitutional amendments." 426 Mich at 6, 9 (emphasis added).

The *Consumers Power* Court correspondingly relied on that sentence of art 12, § 2 to distinguish its holding from that previously reached in *Hamilton v Secretary of State*, 221 Mich 541 (1923). There, notwithstanding Const 1908, art 17, § 2's equivalent limitation of petition signers to "registered electors of this state," the Supreme Court rejected the state defendant's contention that signatures dated 20 months prior to filing on a petition circulated under that section were not collected within a reasonable period. 221 Mich at 544. Here, just as with the former constitutional provision at issue in *Hamilton*, the self-executing procedure of art 2, § 9 "summons no legislative aid and will brook no elimination or restriction of its requirements." *Id*. Rather, "it grants rights on conditions expressed, and if its provisions are complied with and its procedure followed its mandate must be obeyed." *Id*.

2. MCL 168.472a Unconstitutionally Curtails the Right of Initiative.

Following the Supreme Court's very narrow construction of art 2, § 9's implementation clause,[31] the Court of Appeals very recently reaffirmed that the

31 *Wolverine Golf Club*, 384 Mich at 466.

"clear intent in this provision is 'to limit the power of the legislature to that which is 'necessary' to the effective implementation of the initiative right.'" *League of Women Voters v Secretary of State*, __ Mich App __, __ (2020), 2020 Mich. App. LEXIS 709 at *27, quoting *Wolverine Golf Club*, 24 Mich App at 735. Yet, 472a represents the very opposite of such an implementation measure. Providing no facilitative function, it operates only as an extra-constitutional barrier to *prevent* petitioned legislation from reaching the legislature or the electorate.

Having reviewed the version of 472a existing prior to the amendment of 2016 PA 142, the *Consumers Power* Court predicated its upholding of the statute's application to constitutional amendatory initiatives on the fact that:

> The purpose of the statute is to fulfill the constitutional directive of art. 12 sec. 2 that only the registered electors of this state may propose a constitutional amendment. The statute does not set a 180-day time limit for obtaining signatures. The statute itself *establishes no such time limit*. It states rather that if a signature is affixed to a petition more than 180 days before the petition is filed it is presumed to be stale and void. But that presumption can be rebutted. [426 Mich at 8].

But the 2016 amendment replaced the rebuttable presumption with an irrebuttable exclusion of signatures older than 180 days from being counted. Consequently, MCL 168.472a now imposes precisely the type of curtailment that the Supreme Court comparatively contemplated and implied would fail to "follow[] the dictates of the constitution," even as applied to art 12, § 2. 426 Mich. at 7-8.

While the Supreme Court construed that the rebuttable presumption imposed by 472a's former iteration was intended to fulfill the constitutional directive that petition signers must be registered electors of the state,[32] the statute's present formulation could hardly be more poorly tailored to that objective. While even those signers indicated by the Qualified Voter File ("QVF") to be unregistered on the date of signing may rebut the presumption of invalidity to their signatures,[33] the statute now imposes an absolute bar to counting *valid* signatures of registered electors dated over 180 days, irrespectively of those electors' immediately verifiable registration status and residence information.[34]

No longer a safeguard for simply subjecting older signatures to greater scrutiny, the legislature has transformed 472a into a mechanism for restricting the utilization of the initiative process. Indeed, with open acknowledgment of its sole aim of reducing the number of initiatives making the ballot,[35] the legislature has done so even as the QVF has superannuated any distinction as to the determinable validity of older signatures relative to those signed closer to the time of filing.

II. THE COMMITTEE WILL SUFFER IRREPARABLE HARM IF AN INJUNCTION IS NOT ISSUED.

Absent an injunction, the Committee would be denied the opportunity to

---

32 *Consumers Power Co*, 426 Mich at 8
33 MCL 168.476(1)
34 *Id*.; MCL 168.509m; 509o; 509q.
35 See Office of Governor Rick Snyder, *supra* n 22.

place its statutory initiative for approval by the legislature or the state's voters, putting to waste all of the great many thousands of hours donated by the Committee's nearly 1,000 volunteer circulators. The 271,021 state voters who signed Committee's petition would also be denied not only the invocation of their supported initiative, but even the chance to simply have their signatures counted.

Further, because the Committee has no other recourse to challenge 472a's exclusion of its petition signatures, an injunction is the only means to prevent an unconstitutional statute from irreparably depriving the Committee's exercise of the right secured by Const 1963, art 2, § 9. See *Garner v Mich State Univ*, 185 Mich App 750, 764 (1990) (observing that even a "temporary loss of a constitutional right constitutes irreparable harm which cannot be adequately remedied by an action at law.").

III. NO HARM TO DEFENDANT IS APPLICABLE.

To the extent that the Canvassers would incur any conceivable burden from canvassing the Committee's petition, it is one squarely within its primary duties and substantially minimized by the Canvassers' random sampling procedure for petition signatures. And any harm to the Canvassers from the need for an injunction at this time has been brought on by the Canvassers board itself, having spent 17 months maintaining and defending the unlawful refusal to recognize and accept the Committee's petition filing, followed by additional rounds of delay in

issuing its declaration of insufficiency.[36] The balance of harms thus weighs decidedly in the Committee's favor.

IV. GRANTING AN INJUNCTION WILL ADVANCE THE PUBLIC INTEREST.

While the public interest may generally be served by seeing the execution of the laws enacted by the people's representatives, that interest is dampened when such a law's object is to curtail a power that the people expressly "reserve to themselves" in their constitution. Const 1963, 2, § 9. Particularly in so far as MCL 168.472a is constitutionally infirm, the public interest must align with constitutional protection as "it is always in the public interest to prevent enforcement of unconstitutional laws." *Roe v Snyder*, 240 F Supp 3d 697, 712 (ED Mich 2017). the Committee's high likelihood of success on the merits of its constitutional challenge thus supports the public interest in enjoining the present violation.

RELIEF REQUESTED

Wherefore, the Committee respectfully requests that this Honorable Court reverse the Court of Claims' decision, hold MCL 168.472a unconstitutional as applied to statutory initiatives under Const 1963, art 2, § 9 and grant the Committee the relief requested in its motion for preliminary injunction, requiring the Canvassers to canvass the Committee's petition by the July 26, 2020 statutory

36 See Complaint ¶¶ 7-15.

deadline without exclusion of those signatures dated more than 180 days prior to the petition's date of filing.

In the event that such canvassing cannot be performed in time for the July 26, 2020 deadline, the Committee requests that the Court:

1. Order the Canvassers to certify the Committee's petition as sufficient based on the Bureau of Elections' face review confirming it substantially exceeds the requisite threshold of 252,523 signatures; and/or

2. Exercise its equitable power to limit the 40-day period for legislative review so as to accord with that time frame only to "the maximum extent practicable."[37]

Respectfully submitted,

/s/ Matthew Erard
Matthew Erard (P81091)
LAW OFFICE OF
MATTHEW S. ERARD, PLLC
Counsel for Plaintiff-Appellant
400 Bagley St #939
Detroit, MI 48226
248.765.1605
mserard@gmail.com

/s/ Ellis Boal
Ellis Boal (P10913)
Counsel for Plaintiff-Appellant
9330 Woods Road
Charlevoix, MI 49720
231.547.2626
ellisboal@voyager.net

Dated: July 22, 2020.

37 *Ferency v Secretary of State*, 409 Mich 569, 602 (1980); see *id*. at 598-602.